

## MEMORANDUM OF LAW

DATE: December 30, 1985

TO: City Manager

Attn: R. David Flesh, Supervising

Economist, Financial Management Department

FROM: City Attorney

SUBJECT: Gann Limit; Additional Comments Regarding

By memoranda of law dated October 25 and November 20 respectively, we have responded to various questions you have raised concerning the applicability of Article XIII B of the California State Constitution (Gann limit) to certain revenue sources, some types of City "indebtedness," etc. This memorandum is intended to enlarge upon, and to some degree, supersede our views as given to you in the earlier memoranda.

Specifically with respect to Question #2 (September 9, 1985 memorandum) as replied to as Answer #2 on page 2 of the October

25, 1985 memorandum, we note that we did not discuss with you the possibility that franchise fees paid to the City by users of City rights-of-way might be construed as in the nature of lease or rent revenue and thus excluded from application of the Gann limit altogether. (See Answers to Questions #3 and #5 on page 2 and 3 of the October 25, 1985 memorandum).

First of all, franchise fees are paid by the franchise holder as a consideration to the public agency granting the franchise for use of the public right-of-way for some private profit-making service. By and large, this monetary consideration has been held by the California courts to be in the nature of a toll or rental. *San Francisco-Oakland Terminal v. Alameda County*, 66 Cal.App 77, 225 P.304; *Tulare County v. Dinuba*, 188 Cal. 664, 206 P.983; *San Diego v. Southern Calif. Tel. Corp.*, 42 Cal.2d 110, 266 P.2d 14.

In addition, we note that in explaining to the voters what definition should apply to "user charges and user fees," as provided in Section 8(c) of Article XIII B, the authors of the proposal described these kinds of charges and fees as those exacted for a governmental service or product provided by the agency directly to the payer. (Summary of Proposed Implementing Legislation and Drafters' Intent with regard to Article XIII B of the California Constitution (Proposition 4, November 6, 1979 by

Spirit of 13, Inc., page 9)). As they themselves also point out, a case-by-case analysis of whether the charge imposed is a "tax," a "fee" or "charge" (or none of the above), must be evaluated on a case-by-case basis with a proper perspective of prior case and statutory law and the fundamental purpose of Article XIII B. With this in mind, then, we are persuaded that the better view is that franchise fees of the kind we are discussing here are in the nature of rents, not subject to the Gann limit at all, and should be deleted entirely from the Gann limit computations.

The second item to be addressed here relates to our November 20, 1985 response to your inquiry regarding deductions from the Gann limit for the City's contributions to employee retirement plans. On page 3 in the penultimate paragraph, we indicated that based upon California decisional law as set forth in *Carmen v. Alvord*, 31 Cal.3d 318, 182 Cal.Rptr. 506, we were of the view that the entire City annual retirement contribution might be validly deducted from appropriations subject to limitation pursuant to the provisions of Sections 9a and 8g of Article XIII B. We also commented on what we believed to be the appropriate treatment of lease payments for the stadium and planetarium.

Additional research on the issues raised by these items as they relate to Article XIII B now persuades us that our advice to

you on November 20, 1985 is questionable under the circumstances.

A fundamental reason for modifying our view on these issues is that the Carmen case relates to and presently impacts solely upon Article XIII A of the State Constitution. Carmen holds that for purposes of construing the exceptions to the imposition of property taxes under Section 1(a) of Article XIII A, the "indebtedness" concept embodied in Section 1(b) of Article XIII A should include a municipality's obligation arising under contract to pay its retirement and pension plan obligations from time to time. However, to take that rule and apply it to Article XIII B debt limitations without any current statutory or case law authorization or interpretation would, it seems to us, stretch the impact of Carmen beyond its intended result.

Examining again the Spirit of 13, Inc. - Summary, we note that on pages 21 and 22 it, in discussing the nature of indebtedness under Article XIII B, states that obligations to (or the unfunded liability of) employee retirement funds are not intended to be construed as "indebtedness." (Summary of Proposed Implementing Legislation and Drafters' Intent with regard to

Article XIII B of the California Constitution (Proposition 4, November 6, 1979 by Spirit of 13, Inc., pp. 21, 22)).

Thus, we believe it is more appropriate to include the

amounts of City retirement fund contribution and lease payments within all Gann limit computations and our suggestions to the contrary in our November, 1985 memorandum to you on this subject should not be followed.

JOHN W. WITT, City Attorney

By

C. M. Fitzpatrick

Assistant City Attorney

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